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No. 320

In the Supreme Court of the United States

October Term, 1958.

GEORGE H. BRASIER, *Petitioner,*

vs.

CLARK JEARY, PAT ASH, DAVID L. ERICKSON, HARRY BREHM, GEORGE A. MEHSER, CONRAD SCHNEIDER, JACK SCHLEGEL, WELFARE SOCIETY, INC., AMERICA FORWARD ASSOCIATION, INC., AND OTHERS UNKNOWN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

GEORGE H. BRASIER, *Pro Se.*
414 West 12th Street,
Tulsa 19, Oklahoma.

J. A. HAYWARD,
Lincoln 8, Nebraska,
Of Counsel.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Rule, Statute and Constitutional Provisions	2
Statement	2
Complaint	3
Exhibit No. 11 Contracts	4
Hearing	5
Order and Memorandum	9
Notice	9-10
Reasons for Granting the Writ	10
Conclusion	12
Appendix A	13
Appendix B	17
Appendix C	27
Appendix D	27
Certificate	28

TABLE OF CASES.

Bolling v. Sharp, 347 U. S. 497	11, 12
Brasier v. Jeary, 154 F. Supp. 631	9
Connally v. General Const. Co., 269 U. S. 385	12
Hood & Sons v. United States, 307 U. S. 588	12
Johnson v. Zerbst, 304 U. S. 458	10
Yu Cong Eng v. Trinday, 271 U. S. 500	12
28 U. S. C. 1254	2
28 U. S. C. A. Section 1654	2, 11

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GEORGE H. BRASIER, *Petitioner,*

vs.

CLARK JEARY, PAT. ASH, DAVID L. ERICKSON, HARRY BREHM, GEORGE A. MEHSER, CONRAD SCHNEIDER, JACK SCHLEGEL, WELFARE SOCIETY, INC.. AMERICA FORWARD ASSOCIATION, INC., AND OTHERS UNKNOWN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The herein petitioner, George H. Brasier, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Eighth Circuit entered in this controversy on July 21, 1958.

Opinion Below.

The opinion of the District Court dated September 19, 1957 (App. A) is reported at 154 F. Supp. 631. The opinion of the Court of Appeals (App. B) is reported at ... F. 2d ....

Jurisdiction.

The order of the Court of Appeals respecting rehearing and stay of mandate was entered on July 21, 1958 (App. C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Questions Presented.

1. Whether a nonresident party to a civil suit may appear *pro se* in the conduct and management of his own controversy with aid of co-counsel, where, at his own election, has associated resident attorney, by written contingent fee contract, to act as *resident attorney*, for the purposes which resident attorneys are normally associated and consistent with Rule 9 of the District Court.

2. Whether 28 U. S. C. A., Section 1654 is a constitutional delegation of legislative power under Article I, Section 1, and compatable with the essential elements and concepts of equal protection of the law and the full due process of the law secured by the Fifth Amendment, of the Federal Constitution.

Rule, Statute and Constitutional Provisions.

Rule, statute and constitutional provisions involved are set forth in Appendix D.

Statement.

This is an appeal from the order overruling oral motion presented August 7, 1957, denying petitioner who appeared before the Court *pro se*, the right to personally

conduct, manage and control the processes of the instant action, where resident had been associated as co-counsel by way of contract, as hereinafter set forth (R. 1-7).

Complaint.

Petitioner filed his complaint designated "Complaint (at Law and in Equity)" stating that he was a citizen of the State of Oklahoma and the owner of certain real property situated in the City of Lincoln, Lancaster County, Nebraska, at all times complained of, and alleging under two separate causes of action that nine defendants, consisting in the aggregate of officers of the City of Lincoln, Nebraska, two Society Organizations, Incorporated, officers, members and or agent thereof, and others unknown had caused the deprivation of his Civil Rights and other intervening rights in connection with his property, particularly from carrying out a legitimate real estate development and profit-making venture, by way of conspiracy, fraud and other illegal means to the damage of petitioner, and that said property is in a state of seizure. Petitioner alleged that some 220 separate and distinct illegal acts were known to be committed or caused to be committed against the person and property of petitioner by defendants. Petitioner prayed for damages on his first cause of action and equitable relief on his second cause of action. The complaint is signed by petitioner, *pro se*, and by resident attorney, filed May 16, 1957, pursuant to a contract and agreement entered into May 15, 1957, filed as Exhibit No. 11 on August 15, 1957, as follows:

CONTRACTS

"That upon this 15th day of May, 1957, the following individuals agree, that George H. Brasier, party of the first part, of Tulsa, Oklahoma, and J. A. Hayward, party of the second part, Lincoln, Nebraska, as hereinafter follows:

"1. Whereas party of the first part has an action, *pro se,* in the United States District Court, known as Civil Action No. 77 L for damages against certain parties defendant therein, and wishes to engage the services of the party of the second part to act in behalf of the first part in the above mentioned action as the resident attorney therein.

"2. Party of the first part agrees that party of the second part shall receive for his services to first party as set forth in paragraph one, a contingent fee of the gross amount of ten per-cent, regardless of the amount awarded. In the event no damages are awarded to the first party, then second party shall receive no fee. First party pays costs.

"3. Party of the second part agrees to accept the offer of first party, upon the terms and condition set forth by first party and enters upon his employment, and agees to undertake and pursue said action to any court necessary to accomplish satisfaction of the party of the first part.

"4. It is further agreed that when party of the first part is satisfied with any judgment awarded, second party shall have a lien upon said judgment in the amount of ten per-cent for his services in the above matter.

/s/ George H. Brasier
First party

/s/ Cosimina Johnson
Witness to signature

/s/ J. A. Hayward
Second party."

Consequently responsive pleadings and motions were duly filed in behalf of the several defendants by their attorneys, consisting of four lawyers or law firms, and subsequently a hearing was set on August 7, 1957 relative to motions before the Court. Prior to said hearings, petitioner *pro se*, through resident attorney, altered the Court that he expected to proceed *pro se* at the hearing and in all matters connected with the controversy, with assistance of co-counsel, as a matter of right and because of the complexity involved. The Court announced its ruling on the informal matter, holding that inasmuch as petitioner had engaged counsel, the Court deemed it proper that counsel proceed before the Court in all matters before it. Subsequently petitioner, *pro se*; through resident attorney moved for a hearing in open court in order that a record could be made leading to a final order. The hearing appears as follows:

HEARING.

"The Court: I think, gentlemen, at the outset I should explain to you why we are meeting here this morning, as distinguished from hearing these matters in chambers, because, generally speaking, it is going to be my plan to hear motions in chambers.

"I was alerted Monday by Mr. Hayward, and I commend him for doing it, that the plaintiff wanted either argue or assist in the argument of the motions in person. I think probably that my ruling will be no different than it would have been had I ruled on it without having been advised of it ahead of time. Yesterday I told Mr. Hayward that I did propose to refuse to the plaintiff the right to argue his motions in court at this time. Mr. Hayward stated, and he was

entirely right to do so, that he wanted to make a record on the matter, hence it appeared that it might be best that he appear here in open court in order that a record could be made.

"As a result, Mr. Hayward, in making your record it might be well to make it in such a way as you want; that perhaps you make a formal oral motion to permit the plaintiff to appear and either argue or join in the arguing of the motions, as you desire; or, if you have some formal motion that you want to make at this time it should now be made.

"Mr. Hayward: On behalf of the plaintiff we move the court for permission for the plaintiff, inasmuch as he has filed his petition *pro se* here in this case, and wishes to assist counsel in conference on various questions and matters involved in this case, and to assist counsel in argument, to aid counsel in making a statement to the court of such matters either overlooked by counsel or that he considers proper in connection with counsel's statements during the progress of the trial involved in this case.

"The Court: The motion will be denied, and for reasons that I think I should give at this time to aid those who will be practicing, I would very briefly tell you why I am denying it. All of you are familiar with the fact that I am just starting in here, and the result is that I am sure the bar are going to be just as much interested, and the parties are, in what a new judge is going to do and what his general policies will be with reference to matters of this kind.

"At the outset, again I would say that I commend Mr. Hayward for calling the matter to my attention on Monday. He is correct that the original action was filed both *pro se* and by counsel. The original pleadings are so signed, and some of the subsequent plead-

inys are so signed. Based largely on my experience as a lawyer, it seems to me that the orderly process of trials requires that when a party has competent counsel that counsel should represent him. It seems to me that in the trial that if we would get into a position where the party was making objections to evidence or was arguing the Court's rulings, or was even attempting to argue a case to a jury, we then would get away from in orderly process, and that enters into my decision. Then too, it has long been the rule of this court in pre-trial conferences that parties are not to be present. I do not intend to change that rule, which was adopted both by Judge ROBINSON, the Chief Judge, and by Judge DELEHANT when he was chief judge of this district. I think there is some analogy to the situation here, because in pretrial conferences very important matters take place so far as they affect the rights of the parties, and yet the court has not been permitting them to be present.

"Then there is another reason for my ruling that I should call to your attention, Title 28 Section 1654, U. S. Code Annotated: 'In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as by the rules of such courts respectively are permitted to manage and conduct causes therein.' I call to your attention the use of the conjunctive 'or' and call to your attention that the word 'and' is not used. It seems to me that the courts must have something in mind in using the 'or' and that this was the alternative, and that here we have not an absolute election but somewhat of an election. The plaintiff could proceed *pro se* in this case without counsel if he wanted to but, having counsel, it seems to me that it is entirely proper that I should take the position that I am taking here, that counsel are the one to proceed in the case.

"Now I do not find cases specifically in point on it; in fact, I have pretty much reached the conclusion that it is largely in the discretion of the court as to which way to go in the matter of this kind. In *Shelton v. U. S.*, 204 F. 2d 806, the defendant appeared *pro se*, but he wanted an attorney appointed with whom he could consult—not to handle the case—but he wanted a lawyer appointed with whom he could consult. It was held that the court did not abuse its discretion in refusing the appointment of counsel under those circumstances.

"And then in *U. S. v. Foster, the* famous case tried before Judge Medina of New York, 9 Federal Rules Decisions 367, Judge Medina in passing upon a similar—not exactly similar question but one that I thought was somewhat helpful—says in the federal courts 'where a defendant has no right to be heard both in person and by attorney,'—then he goes on to comment on another matter. So that I think he draws there a definite distinction and takes a definite position that one does not have a right to appear both in person and by an attorney. In that case, interesting enough—it was the Communist case—one of the defendants at the end of the trial, who was an attorney admitted to practice both in the federal courts and the state courts in Georgia, wanted to plead his own case to the jury, and his attorney wanted to withdraw for that purpose, and the judge overruled; he said that even the withdrawal or permission for counsel to withdraw was within the discretion of the court and he didn't have to grant it and he did not permit the man to argue his case in person at the conclusion.

"While I say to you that none of these cases are just specific cases in point, I do think that in stating

out here I should tell you some (—) the reasons for my conclusion, and, that, generally speaking, I think we will follow along with the idea that when a party has employed competent counsel that counsel will run the lawsuit both in arguing motions, in the examination of witnesses, in the making of objections to the testimony, and the argument of the case to the jury.

"I therefore return to the statement that I made in the beginning, that the motion will be denied and counsel alone will proceed with the argument of the motions."

Order and Memorandum.

The order of the court appealed from, dated August 7, 1957, is as follows:

"Upon oral motion of J. A. Howard that plaintiff be allowed to participate as counsel in this case, it is ordered by the court, that said motion be and hereby is denied."

Petitioner duly filed a motion for rehearing requesting thirty days to file brief, which 10 days was granted by the court, and same having been filed and considered by the court, the motion was denied for the reasons set forth in the court's memorandum of September 19, 1957, reported as *Brasier* v. *Jeary*, 154 F. Sup. 631, and to which reference is hereby made.

Notice.

Petitioner tendered his notice of appeal to the Clerk of the Court via United States Air Mail and same was re-

ceived by said clerk on the 17th day of October, 1957. T notice of appeal was filed on the 19th day of October, 19 and reads as follows:

> "Comes now the herein plaintiff, George H. Brasier, and gives notice of appeal to the United States Court of Appeals for the Eighth Circuit, for review from the final judgment of the court entered in the action on September 19, 1957, standing upon its original interlocutory ruling."

Reasons for Granting the Writ.

1. The decision of the court below is in direct express conflict with the facts presented in the instant controversy, and has sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision, and has decided an important questio of federal law which has not been, but should be, settled b this Court. That said decision ignores the applicable decisions of this Court, and is predicated in the main upo the erroneous assumption that petitioner waived his fundamenta right to appear *pro se* by the association of resident attorney (App. A.).

The record shows that petitioner a nonresident, signe the Complaint *pro se* and Mr. Hayward signed same as r sident attorney pursuant to a contingent fee contract a leging deprivation of his Civil Rights (R. 1-3). In *John son* v. *Zerbst*, 304 U. S. 458, this Court laid down the ru of law concerning the loss of fundamental rights essentia of due process:

> "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. * * * [A] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. * * * And it would be fitting and appropriate for that determination to appear upon the record."

Petitioner's contention is that by engaging a resident attorney did not constitute a waiver, but rather, petitioner sought to exercise his right under the concept of the "equal protection of laws" by electing the same privilege as nonresident attorneys pursuant to Rule 9 of the District Court (App. D) without discrimination. In *Bolling v. Sharp*, 347 U. S. 497, this Court fused the concepts of "equal protection of laws" and "due process of law":

> 'The concepts of equal protection of laws, and 'due process of law,' though not always interchangable, are not mutually exclusive. Discrimination may be so unjustifiable as to be violative of due process. * * * Liberty under law is not confined to mere freedom from bodily restraint; it extends to the full range of conduct which the individual is free to pursue * * *. The Constitution of the United States forbids, so far as civil and political right are concerned, discrimination by the general government, or by the states, against any citizen * * *."

2. Under question two (2) petitioner contends that 28 U. S. C. A., Section 1654, is unconstitutional because vague, indefinite and transgresses the constitutional division of power repugnant to Article 1, Section 1, and vio-

lates the essential elements and concepts of equal protection of law and the full due process of law secured by the Fifth Amendment to the Federal Constitution. In *Connally* v. *General Constr. Co.*, 269 U. S. 385, and *Lanzetta Eng* v. *Trinday*, 271 U. S. 500, this Court held an attempt to enforce a vague statute was not due process and that an indefinite statute violated due process of law. In the dissenting opinion of ROBERTS, MCREYNOLDS and BUTLER in *Hood & Sons* v. *United States*, 307 U. S. 588, the statute therein, establishes a rule of law that cannot be ignored. Section 1654 as it now stands, as construed by the lower courts, denies the parties acting *pro se* the same privileges as attorneys. Must a non-reident party stand coerced and discriminated against because he chooses to represent himself, while attorneys may have as many associates as they wish? Must the herein petitioner stand alone against four (4) law firms? Is that the logical conclusion of due process of law and the equal protection of the laws? Petitioner thinks not. The concepts found in *Bolling* v. *Sharpe* supra should be reaffirmed.

Conclusion.

The conflict herein should be resolved by this court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE H. BRASIER, *Petitioner*,
414 West 12th Street,
Tulsa 19, Oklahoma.

J. A. HAYWARD,
Lincoln 8, Nebraska,
Of Counsel.

Appendix A.

GEORGE H. BRASHER, Plaintiff,

v.

CLARK JEARY, et al., Defendants.

Civ. No. 77 L.

United States District Court D. Nebraska.

Sept. 19, 1957.

Civil Action. Plaintiff moved for rehearing on a ruling of the court denying him the right to personally argue certain motions which had been set for hearing. The District Court, Van Pelt, J., held that where plaintiff employed counsel, he had no right to be heard in person, but was required to rely upon his chosen counsel, notwithstanding the fact that his original complaint was signed by himself *pro se*, and by his counsel as resident attorney for plaintiff.

Order in Accordance With Opinion.

1. Attorney and Client 62.

Where plaintiff employed counsel, he had no right to be heard in person, but was required to rely upon his chosen counsel, notwithstanding the fact that his original complaint was signed by himself *pro se*, and by his counsel as resident attorney for plaintiff. 28 U. S. C. A., Sec. 654.

2. Attorney and Client 62.

District Court rule providing that all attorneys residing outside of the district shall associate with them in an

action, a resident attorney who shall sign the first pleading and continue in the case unless other resident counsel be substituted, has no application to case filed *pro se*. U. S. Dist. Ct. Rules Neb., Rule 9."

J. A. Hayward, Lincoln, Neb., for plaintiff.

C. Russell Mattson, Lincoln, Neb., for defendant Clark Jeary.

Jack M. Pace, Lincoln, Neb., for defendants Erickson and Ash.

William L. Walker, Lincoln, Neb., for defendants Brehm,, and others.

Elmer Scheel, Lincoln, Neb. for defendant American Forward Ass'n, Inc.

Van Pelt, District Judge.

This matter is now before the Court on the Motion for Rehearing filed by plaintiff in which he complains of the ruling of this Court of August 7, 1957, denying plaintiff, who appeared before the Court, the right to personally argue the motions which were that day set for hearing.

The Court, having been alerted to plaintiff's request by plaintiff's counsel prior to August 7th, had some opportunity to brief the question and upon consideration thereof, after the request was formally made, denied plaintiff personally the right to argue the motions and orally stated its reasons for the ruling. The matter then proceeded with plaintiff's counsel arguing the motion which had been set for hearing.

It should be stated as a part of the factual background that plaintiff's original Complaint was printed and is signed personally by plaintiff and is also signed by his attorney, J. A. Hayward, as follows:

"/s/ George H. Brasier,
Pro Se, and,
/s/ J. A. Hayward,
Resident attorney for plaintiff,
138 North 12th Street, Rm. 223,
Lincoln 8, Nebraska."

The printed brief filed by plaintiff in support of his Motion for Rehearing, and signed *pro se*, does not persuade the Court that it was in error in the ruling announced and the Motion for Rehearing will be overruled.

It is the Court's judgment, based largely on experience as advocate in the trial of cases, because this judge's service on the bench began August 1st, that the orderly administration of the judicial processes requires that when a party has counsel, counsel shall make all appearances, including the argument of motions, and counsel only shall make the objections to be made to the reception of evidence and the arguments to the Court or jury. It is the Court's opinion that to permit clients to do any one or more of these things or to permit parties to do so where they have designated themselves as appearing *pro se* and in addition have employed an attorney, would not only disturb the orderly administration of judicial processes, but would also result in delays in judicial administration.

The Court has been advised that plaintiff in this case may propose to use counsel to advise him on matters of law and the reception of evidence and expects at the trial to request the right to examine and cross-examine witnesses and plaintiff believes that he has the right, and may request permission, to make arguments, either to the Court or to the jury. The Court, therefore, has gone beyond the matters immediately before it, in order to answer plaintiff's inquiry as to the full impact of the Court's orally announced ruling.

(1) This Court believes that the use of the disjunctive "or" in Title 28, U. S. C. A., Sec. 1654, is controlling and that in the Federal Courts a party has no right to be heard both in person and by an attorney. Specifically, in this case, the plaintiff, having counsel, the Court holds that plaintiff has no right to be heard in person whenever either his whim or his considered judgment dictates and having employed counsel must rely upon his chosen counsel.

The Court believes that the ruling of Judge Medina in United States v. Foster, D. C., 9 F. R. D. 367, is instructive and correct. See, also, Shelton v. United States, 5 Cir., 205 F. 2d 806.

(2) Plaintiff in his brief contends that he has associated a resident attorney with him pursuant to Rule 9 of this Court. Rule 9 cannot be read to apply to cases filed *pro se*. It reads:

"Admission to Try a Particular Case. All attorneys residing outside of the District, and having business in

this court, shall asociate with them in the action a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case; Such resident attorney shall sign the first pleading filed and continue in the case unless other resident counsel be substituted.

An appropriate Order will this day be entered.

Appendix B.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,937 .

Appeal from the United States District Court for the District of Nebraska.

GEORGE H. BRASIER, *Appellant,*

vs.

CLARK JEARY, PAT ASH, DAVID L. ERICKSON, HARRY BREHM, GEORGE A. MEHSER, CONRAD SCHNEIDER, JACK SCHLEGEL, WELFARE SOCIETY, INC., AMERICAN FORWARD ASSOCIATION, INC., and OTHERS UNKNOWN, *Appellees.*

(June 23, 1958.)

George H. Brasier, Appellant, *pro se.*

No brief filed on behalf of Appellees.

Before Gardner, Chief Judge, and Vogel and Matthes, Circuit Judges.

Vogel, Circuit Judge.

In this appeal there is raised the single question of whether a party to a civil suit may appear *pro se* and insist on the right to be represented by counsel at the same time. Appellant, a non-resident of Nebraska, commenced this suit for damages signing the complaint "George H. Brasier, Plaintiff, *pro se*." The complaint was also signed by "J. A. Hayward, Resident Attorney," with whom appellant had a written contingent fee contract. Before commencement of the jury trial and in chambers, Mr. Hayward made the following motion:

"On behalf of the plaintiff we move the court for permission for the plaintiff, inasmuch as he has filed his petition *pro se* here in this case, and wishes to assist counsel in conference on various questions and matters involved in this case, and to assist counsel in argument, to aid counsel in making a statement to the court of such matters either overlooked by counsel or that he considers proper in connection with counsel's statements during the progress of the trial involved in this case."

The motion was denied. See the trial court's opinion. Brasier v. Jeary, 1957, 154, F. Supp. 631. "J. A. Hayward of counsel" appears on appellant's brief in this court but appellant, personally, presented the oral argument without assistance.

28 U. S. C. A., Sec. 1654 provides as follows:

"Sec. 1654. Appearance personally or by counsel in all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (Emphasis supplied.)

Appellant's first contention is that the foregoing statute is so indefinite and vague that it "• • • is violative of the essentials of 'due process of law' secured by the Fifth Amendment to the Federal Constitution." His second contention is that he possesses a fundamental right to appear in person in the federal courts and to "• • • conduct the prosecution of his own controversy with aid of associate counsel, and that Congress and the Judiciary do not have one scintilla of authority to deny that right, and to do so would be violative of 'due process of law' secured by the Fifth Amendment to the Federal Constitution."

We do not find Sec. 1654 vague and indefinite as contended by the appellant. It seems to us that it clearly sets forth that in all courts of the United States parties have the right to plead and conduct their cases personally or by counsel and that such representation by counsel shall be in accordance with the rule of the courts.

Appellant directs our attention to Rule 9 of the District Court of the District of Nebraska as follows; "Admission to Try a Particular Case All attorneys residing outside of the District, and having business in this court, shall associate with him in the action a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters, including pre-trial conferences and the trial of the case. Such resident attorney shall sign the first pleading filed and continue in the case unless other resident counsel be substituted." The rule is directed specifically to non-resident attorneys and is similar to rules adopted in most jurisdictions, hav-

ing the twin objectives of convenience for service of process and the presence of counsel within the jurisdiction of the court. It is not applicable to a *pro se* proceeding. If any attempt were made to force non-resident parties to employ resident counsel in the manner contemplated by Rule 9, *supra*, then grave doubt would be cast upon the legality of such proposed rule. It seemingly would violate 28 U. S. C. A., Sec. 1654, *supra*. We think local Rule 9 is of no aid to appellant in his present contention.

As to appellant's second point, there is no doubt about his possessing the right to appear in person and conduct the prosecution of his own case, but we do not agree that in doing so he possesses the fundamental right to also have the aid of counsel. 28 U. S. C. A., Sec. 1654 is directly derived from the first Judiciary Act of September 24, 1789, c. 20, Sec. 35, 1 Stat. 73, 92, R. S. of 1873, Sec. 747. In its original form, the statute reads:

"In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts, respectively, are permitted to manage and conduct causes therein." (Emphasis supplied.)

In Osborn v. United States Bank, 1824, 9 Wheat. (22 U. S.) 738, 829-830, Mr. Chief Justice Marshall, in deciding a related question, made the folloing statement:

"Natural persons may appear in court, either by themselves, or by their attorney. • • • A corporation, if is true, can appear only by attorney, while a natural person may

appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived, why the same evidence should not be required, that the individual professing to represent him has the authority to do so, * * *." (Emphasis supplied.)

The original passage of the subject statute during the initial year of our present form of government and its several re-enactments without substantial change do not preclude the existence of a contrary fundamental constitutional right, but they are highly persuasive of its non-existence. The assumed propriety and definition of the statute's effect as indicated by Osborn v. United States Bank, supra, further diminishes the probability of existence of the right claimed here by appellant. In the absence of any specific provision in the Constitution or a showing of a practice in the Colonies contrary to 28 U. S. C. A., Sec. 1654, resort may be had to the prior law of England for a determination of appellant's claimed right. See Murray's Lessee v. Hooken Land & Improvement Co., 1855, 18 How. (59 J. S.) 272, 276, 277. Research discloses that when attorneys were first permitted to appear for a party as a matter of course under the Statute of Westminster, Second, ch. 10 (A. D. 1285) Coke's Institutes, Second (Ed. of 1817), an appropriate writ commanded in part "that the attorney whom S. shall make in his stead to do suit for him" be received "in the place of the said S. for this purpose." Fitzh. Nat. Brev. 156 (1534) (9th ed. 1794).

In Coke's Institutes, Fourth, (1644) (Ed. of 1817), page 296, we find language similar to that of 28 U. S. C. A. Sec. 1654:

"And any person that is to make any claim may the first day of the eire (circuit court) either make it in person or by attorney * * *See before cap. Justices in Eire writ in the Regist(er). 19. a. W(estminster). 2, cap. 10." (Emphasis and parentheses supplied.)

We think it clear that the statutes and settled usages of England provides that parties litigant were to make their claims either in person or by attorney. The alternative appears to be very clear, justifying the conclusion that where a person elected to appear by attorney, he waived the privilege of appearing for himself. Cf. Osborn v. United States Bank, supra. We find nothing in our research to justify appellant's assertion that he possesses the fundamental right to appear for himself personally and also be represented by counsel at the same time. Denial of the right to appear in both capacities is not, in our opinion, violative of "due process of law" as secured by the Fifth Amendment.

There is another factor which should be weighed with appellant's claimed right. That is the power and responsibility of a federal judge in a jury trial to govern and control the conduct of the trial. See Herron v. Southern Pacific Co., 1931, 283 U. S. 91, 95, wherein it is said:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the

purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides."

It should be noted here that attorney Hayward's motion in behalf of the appellant requested that the appellant be allowed to "assist counsel in argument" and "to aid counsel in making a statement to the court of such matters either overlooked by counsel or that he considers proper in connection with counsel's statements during the progress of the trial * * *" This is an effort by a party to a civil suit to have counsel represent him to also have the unqualified right to interfere with the proceedings at any point he desires, to join in the arguments to court and jury, and to supplement his counsel's statements whenever he saw fit to do so. This we believe comes clearly within the discretionary power of a trial judge to control and regulate the orderly procedure of the trial. Herron v. Southern Pacific Co., supra. Even in criminal matters it has consistently been held that it was not error to deny a defendant's request that he be permitted to act as his own counsel at a time when he was represented by counsel of his choice. In the very recent case of Egan v. Teets, 9 Cir., 1957, 251 F. 2d 571, 578-9, it was held that the trial court's denial of Egan's request that he be permitted to act as his own counsel at the same time that he was represented by counsel of his own choice did not deprive Egan of any federal constitutional right. In United States v. Foster, et

al., D. C. N. Y., 9 F. R. D. 367, Judge Medina held that an accused has no right to be heard both in person and by attorney. In denying the request of one of the defendants to be allowed to discharge his attorney (held to be mere subterfuge and not in good faith) and argue his own case to the jury, Judge Medina stated, at page 372:

"In the federal courts, where a defendant has no right to be heard both in person and by attorney, it would seem clear that the control of the proceedings by the court is no less extensive. Cf. Eury v. Huff, 4 Cir., 1944, 141 F. 2d 554; Overholser v. De Marcos, 1945, 80 U. S. App. D. C. 91, 149 F. 2d 23, 26."

See also State v. Townley, 1921, 149 Minn. 5, 182 N. W. 773, 17 A. L. R. 253, 271, certiorari denied, 257 U. S. 643. In Shelton v. United States, 5 Cir., 1953, 205 F. 2d 806, 812, the defendant in a criminal case was denied the right "to manage his own case and yet have the assistance of counsel." There "* * * defendant persisted in his contention that, under the Constitution of the United States, he had the right to assistance of counsel, as he interpreted those words, and that the statute, Section 1654, Title 28, U. S. C. A., which undertook to state the defendant's right in the alternative was contrary to the Constitution and invalid." The Court of Appeals for the 5th Circuit stated, page 813 of 205 F. 2d:

"We cannot agree with the defendant that the statute was invalid or that the action of the court in declining to permit the defendant to dictate the way in which his case

should be tried, deprived him of any constitutional right. Indeed, his stubborn and persisitent contentiousness in respect to the reasonable rulings and requests of the trial judge in the matter of the conduct of the trial and the judge's patience and uniform courtesy in conducting it under great difficulties both tremendously and unduly prolonged the trial and afforded him the widest latitude to get before the jury matters he wished them to know without his having to take the stand."

See United States v. Private Brands, Inc., 2 Cir., 1957, 250 F. 2d 554, certiorari denied, 255 U. S. 957; United States v. Mitchell, 2 Cir., 1943, 137 F. 2d 1006, rehearing 138 F. 2d 831, certiorari denied, 321 U. S. 794, rehearing denied 322 U. S. 768.

The Court of Appeals for the District of Columbia, in Overholser v. De Maros, 1945, 149 F. 2d 23, 26, certiorari denied, 325 U. S. 889, had occasion to comment about the conduct of a case in which the petitioner, in a habeas corpus proceedings, was represented by counsel but nevertheless conducted his own case:

"During the hearing the petitioner was represented by counsel. Nevertheless the court permitted petitioner to conduct the trial while his counsel sat silent. This is an undesirable practice. Where a party is represented by competent counsel his case should be conducted by that counsel unless it becomes apparent that the interests of justice require the party's active participation *pro se*. Such circumstances are rare and were not present in this case."

We conclude that the appellant has no constitutional or other right to conduct his own case *pro se* and have the aid of counsel to speak and argue for him at the same time. It may be, as suggested by the Court of Appeals of the District of Columbia in Overholser v. De Marcos, supra, that in rare circumstances it might be good practice and could aid in the fair presentation of claim or defense if a party were allowed to actively participate in the conduct of the trial, even though represented by counsel. The determination of when such situations arise rests squarely with the trial judge, who bears the responsibility for the orderly conduct of the trial, and an appellate court should not interfere with the trial court's exercise of that discretion. Here the appellant's complaint asserted that the several defendants had "by way of conspiracy, fraud and other illegal means" committed some 220 separate and distinct illegal acts "*** against the person and property" of appellant. Appellant also claimed a consequent deprivation of his civil rights. The orderly conduct of this potentially complicated trial was the responsibility of the trial judge. It was within his power to grant or deny the motion made by appellant's counsel. In exercising his discretion he committed no error.

Affirmed.

A true copy.

Attest: Cerk, U. S. Court of Appeals, Eighth Circuit

Appendix C.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 15937. September Term, 1957.

Appeal from the United States District Court for the District of Nebraska.

GEORGE H. BRASIER, Appellant,

vs.

CLARK JEARY, et al.

On consideration of Petition of the appellant for a rehearing by this Court en banc in this cause. It is now here ordered by this Court that the same be, and it is hereby, denied.

And it is further ordered by this Court, on consideration of the further motion of appellant for a stay of the mandate in this cause pending petition to the Supreme Court of the United States for writ of certiorari, that the issuance of the mandate be, and it is hereby, stayed for a period of thirty days from and after this date, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until final disposition of this case by the Supreme Court.

July 21, 1958.

Appendix D.

28 U. S. C. A., Section 1654:

"In all of the courts of the United States the parties may plead and conduct their own cases personally or by

counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." As amended May 24, 1949, Sec. 91, 63 Stat. 103.

Rule 9 of the District Court:

"Admission to Try a Particular case.

"All attorneys residing outside of the District, and having business in this court, shall associate with them in the action a resident attorney on whom notice may be served and who shall have authority to act for and on behalf of the client in all matters, including pre-trial conference and the trial of the case. Such resident attorney shall sign the first pleading filed and continue in the case unless other resident counsel be substituted."

Article I, Section 1, Federal Constitution:

"All legislative powers herein granted shall be vested in a Congress of the United States, * * *."

Fifth Amendment to the Federal Constitution:

"* * * nor be deprived of life, liberty, or property, without due process of law; * * *."

CERTIFICATE.

I do hereby certify that copies of the foregoing Petition have been mailed to attorneys for parties herein concerned and the Solicitor General of the United States.

.....

GEORGE H. BRASIER.

August, 1958.